No. 15363

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILDRED MARIE YOUNG, individually and DANNY LEE YOUNG, DAVID RAY YOUNG and DANIEL RAY YOUNG, through their guardian *ad litem*, Mildred Marie Young,

Appellants,

vs.

AEROIL PRODUCTS COMPANY, INC., a corporation, STRUCTURAL MATERIAL COMPANY, a corporation and DERYL S. YUNDT,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANTS' REPLY BRIEF.

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I.

The Appellants' Brief Does Comply With Rule 18, 2(d).

The appellees quote from the case of *Thys Company v. Anglo California Bank,* 219 F. 2d 131, at page 132; however, the quotation is not complete. The quotation is proceeded by the following sentence:

> "Here, appellants' first specification of error as to five findings of fact, four conclusions of law, and two distinct questions relating to the admissibility of evidence."

Therefore, the *Thys Company* case is not in point. Appellants in the present appeal have set forth each error separately. If there is no evidence to support a finding, there is no way but to state the negative. If one states there is no evidence to support a finding, then all the evidence must be looked at and if it isn't there the negative is proved. Surely the court intends in the rule for the negative to be merely stated. It seems inconceivable that with each error the court wants all the evidence and then a statement there is no evidence to support the quoted finding.

II.

The Judgment Should Be Reversed Because the Evidence Does Not Support the Findings.

The appellees' brief states on page 24 last sentence as follows:

> "When Weigart purchased the conveyor he relied on the statements as to how it was to be used and that one of his employees could handle and operate the machine and he relied on the advertising matter that he showed his employees. He (Weigart) remembers bringing the conveyor to the job. He had brochures, Exhibits 1 to 6, he showed them to Herbert Young. He went over them with all the employees. Weigart was not present at the time of the accident. He was told about it and went to the scene. Sometime that day he remembers a phone call to Deryl S. Yundt. He told Yundt that the machine had collapsed and killed one of his employees and that he would like to have him come to the scene to see the machine. Yundt stated that he knew what happened and there was no need of coming out."

The court admitted this evidence. The objection of the defendants was overruled. [Tr. Vol. II, p. 135, lines 15-19.] There was no denial of this by defendants.

Then, at page 10 the appellees state:

> "Young had been handling the machine the way that they customarily handled it. When he (Thomas) saw Young move the conveyor he would usually turn it parallel to the street and then lower the boom to move the conveyor to another location. He had seen Herbert Young move the conveyor in the same way before but never saw him carried up into the air."

At page 13,

> "He (Thomas) had operated the conveyor and relied on the statements he had seen in the advertising as to how to operate the conveyor. The only instructions that Thomas had had as to operating the machine were in the brochures."

There is nothing in the evidence that appellants can find about the "riser" being thirty inches in height. The evidence is that it was 18 inches.

On page 17, the appellees state "Aeroil handed them out (the brochures) without making any investigation."

On page 27, the appellees state: "When Weigart was working for Bennett he first saw copies of the brochures which are Exhibits 1 to 6."

The trial court admitted into evidence the brochures marked Exhibits 1 to 6, inclusive. [Tr. Vol. II, p. 8, lines 21-23.]

The appellants prepared a narrative statement of the evidence and endeavored to have it made a part of the record on appeal. This was to save cost and aid the

court. The defendants objected to a narrative statement and insisted on the whole transcript which was furnished.

The appellees have not referred to the transcript to point out where the testimony is that supports any of the questioned findings. If there is testimony to support a finding it can be pointed out. They instead wrote a long statement of the evidence which does not support the findings.

The appellees, on page 31 of their brief, state:

> "In his (Dr. Wood's) opinion, if the 18 inch plate had not been on the normally lower end there would have been some slight but in his opinion insignificant changes. The energy generated by the machine tipping over would be less but still more than needed to cause the machine to collapse. If the rollers were constricted this type of collapse could not occur."

III.

Answer to Appellees' Point III.

In answer to Point III of the appellees' argument, appellants wish to state the following:

In the case of *Collum v. Pope & Talbot,* 135 Cal. App. 2d 653, 288 P. 2d 75, the court stated:

> "More fundamental, however, and pivotally significant, is the fact that the cutting of logs into boards of varying sizes is not 'manufacturing' within the meaning of that word, or its variants, as used by Supreme Court when in the Burr Case it noted the two exceptions to the requirement of privity of contract."

The definition referred to is stated by the court as follows:

> "Each has to do with a product which has been put together, manufactured, assembled, fabricated, and marketed in such a fashion that it does not admit of ready inspection and contains deleterious or defective ingredients which render it unfit for the use for which it is expressly or impliedly warranted."

Then the court refers to *Bahlman v. Hudson Motor Car Co.* (1939), 290 Mich. 683, 288 N. W. 309, in which the literature represented the auto had a seamless steel roof. Also, the case of *Baxter v. Ford Motor Co.* (1932), 168 Wash. 456, 12 P. 2d 409, 88 A. L. R. 521, which was an express representation that the windshield of a car was shatterproof glass. The court quotes from *Escola v. Coca-Cola Bottling Co.,* 24 Cal. 2d 453, 467-468, 15 P. 2d 436, 443.

The court then stated:

> "He (the mill operator) merely took sections of a tree, a product of nature, and cut them to size."

This case is not in point because the portable elevator is a manufactured product. It is put together by man and designed by man. It is not a product of nature. The defective ingredient in the conveyor was that the articulate member of the undercarriage was not constrained against motion toward the normally lower end of the machine except by the weight of the conveyor or "boom" and this defect rendered it unfit for the use for which it was expressly warranted (*i. e.,* to be handled and operated by one man and easily manuevered). This defect was not apparent by inspection of the machine.

The case of *Ivancovich v. Bertossi,* 202 Cal. 770, 202 Pac. 748, cited by appellees is not in point. One witness testified that the mixing of the white or muscat wine with zinfandel wine would spoil the mixture. The evidence on this point is quoted.

In the present set of facts, the evidence is that the "riser" or 18 inch plate on the normally lower end made no significant difference. Dr. Wood testified,

> "Therefore, since the energy available is considerably larger than the energy required, again it is my opinion that the collapse would occur in that case in essentially the same manner." [Tr. Vol. II, p. 196, lines 21-24.]

The appellees own statement of the evidence on page 29 states that Mr. Lowell E. Annan testified,

> "When he had completed the December, 1953 job, after the conveyor was turned over, from his many years of experience in doing that type of work and from looking at the conveyor he could tell it was in its former condition." [Tr. Vol. II, p. 162, lines 19-24; p. 159, lines 5-8.]

All of the evidence is that the defect in the conveyor was present at the time of its delivery to Weigart and was not affected by the 18 inch plates or "riser" or by the repairs in welding or by its tipping over sidewise and being repaired to its former condition. The defect was inherent in the machine at the time it was assembled and marketed by Aeroil and continued as a constant hazard to any laborer who used the machine. Aeroil assembled, marketed and made advertising statements about the machine to induce its sale and use without any tests at all to see if the machine was safe to be used by laborers

or if the statements about the machine were true. This conveyor was a death trap and should never have been put on the market.

The appellees rely heavily on the case of *Vogel v. Thrifty Drug Co.,* 43 Cal. 2d 184, 272 P. 2d 1. We do not believe this case is in point. In the *Vogel* case the plaintiff was the buyer. Civil Code, Section 1769, reads in part:

> "But, if, after acceptance of the goods, the *buyer* fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the *buyer* knows, or ought to know of such breach, the seller shall not be liable therefor."

In the present appeal, the plaintiff, Mildred Marie Young, and her children are not the "buyer". There is no buyer-seller relationship between the plaintiffs and the defendants.

The difficulty in this case has been to endeavor to understand what the California Supreme Court has established in the case of *Burr v. Sherwin-Williams Co.,* 42 Cal. 2d 682, 68 P. 2d 1041, and *Kalash v. Los Angeles Ladder Co.,* 1 Cal. 2d 229, 34 P. 2d 481; *Lane v. C. A. Swanson & Sons,* 130 Cal. App. 2d 210, 278 P. 2d 723; *Escola v. Coca-Cola Bottling Co. of Fresno,* 24 Cal. 2d 453, 15 P. 2d 436; *Sheward v. Virtue,* 20 Cal. 2d 410, 126 P. 2d 345; *Free v. Sluss,* 87 Cal. App. 2d (Supp.) 933, 197 P. 2d 854.

As discussed above, the article must be manufactured. It must not be a product of nature. This is obviously so that there is human control over its design and construction. Its safety can be controlled. The next element is that the manufactured product must be defective so

as to place life or limb in peril. Then there must be some wrong by the defendants. The wrong takes various forms. In the *Escola* case it was the failure of the person who filled the bottle with Coca-Cola to test the bottle for defects. In the *Swanson & Sons* case it was advertising the chicken as "boned" when it was not. In the *Burr* case, it was putting weed killer in the spray and not stating this on the label listing the active ingredients. In the *Kalash* case it was not inspecting the rung on the ladder that broke. In *Free v. Sluss,* it was the words "Guarantee of quality" printed on the soap when the soap was not good.

Then in this type of case, the court has held in *Gosling v. Nichols,* 59 Cal. App. 2d 442, 139 P. 2d 86, that it is a wrong or a tort.

The court rules out privity of contract because the wrong is the actionable element.

In the present case the wrong is that the defendant, Aeroil, printed and distributed the brochures which were not true without any tests or investigation as to their truth and thereby causing reliance thereon and the resulting death of Herbert Weldon Young.

This is not a buyer-seller warranty case. The cause of action as pointed out has been held by the California court to be a tort and the tort rules apply.

There was no buyer-seller relationship in the *Escola* case. The plaintiff was a waitress in a restaurant. The bottle of Coca-Cola was delivered and sold to her employer. In the *Kalash* ladder case the employee was the plaintiff. In the *Burr* case, the owner of the cotton field was not the purchaser of the insecticide. In none of these

cases is notice required as it is when the action is between buyer and seller.

The appellees also rely heavily on *Tourte v. Horton Manufacturing Co.,* 108 Cal. App. 22, 200 Pac. 919. This case is no longer California law. The recent *Temeroli v. Austin Trailer Equipment Co.,* 102 Cal. App. 2d 464, 227 P. 2d 923, at 931, states the following:

> "It is next apparently urged that, in the absence of knowledge on the part of the seller of a latent defect, the seller, who is not the manufacturer, is not liable for damage caused by latent defect. In this connection Tourte v. Horton Mfg. Co. is cited. That case undoubtedly held that a seller who was not a manufacturer was not liable for a latent defect, at least where the buyer had knowledge of the defect. That case was decided under the law as it existed prior to the adoption of the Uniform Sales Act in this state. While there are a few cases that hold that it was not the intention of the Sales Act to make a seller who is not the manufacturer liable for damages caused by a latent defect, the substantial weight of authority is to the effect that under the Uniform Sales Act, the implied warranty extends to latent defects. This appeals to us as sound law."

The case of *Sears Roebuck v. Marhenko,* 121 F. 2d 598, was decided before the *Temeroli* case and therefore relied on the *Tourte v. Horton Manufacturing Co.* case. Therefore, when the case of *Tourte v. Horton Manufacturing Co.* fell, also the *Sears Roebuck v. Marhenko* case must fall because it was standing upon the *Tourte* case.

Mr. Baker testified [Tr. Vol. II, p. 112, lines 17-24] as follows:

> "Q. Did you ever hear any orders from anyone as to how it was to be moved? A. No, sir. Every time I seen it moved, it was about the same procedure and I just took it for granted that that was it; I don't know anything about it.
>
> Q. Was that the way you saw it moved every time Herbert Young moved it? A. Yes, sir.
>
> Q. And as I understood, he was in charge of that conveyor when he was working on it ordinarily. A. Yes, sir."

Then on page 102, Tr. Vol. II, line 25, and page 103, lines 1 and 2:

> "Q. When you moved the conveyor from place to place, did you leave the motor on? A. No sir, we had to take it off."

Mr. Weigart testified, page 140, Tr. Vol. II, lines 4-16:

> "Q. Now, with reference to this particular piece of equipment, what instructions did you give as to how it was to be moved? A. I went over the brochures with the employees and showed them each item and told them how to raise it and how to lower it and how to put it in position, to the best of my knowledge from the brochures.
>
> Q. You told them, with reference to how to lower it, that it should be pulled away from the building and lowered before it was moved, is that right? A. It would have to be pulled away from the building before lowering it.
>
> Q. Then you said to pull it away and lower it? A. You would have to move it before you lowered it."

Mr. Thomas testified at page 42, Vol. II, line 7, to page 43, line 2:

"Q. Wasn't there some rock that had been spilt on the street then? A. Yes.

Q. Did you see it afterwards? A. Yes, there was some rock spilt there, yes.

Q. With reference to the wheels, did you notice whether either of the wheels of the elevator struck any of that rock? A. No, they didn't.

Q. The wheels were swung a matter of a 45 degree turn before the time that the top of the elevator went down? A. Yes.

Q. And had you seen Mr. Young move this elevator before? A. Yes.

Q. And in doing that, the handler always swings it around so it was parallel with the street, before moving it to the next place? A. No, not always. If there were any obstructions you would have to swing it that way; like in that particular case, he had to swing it far enough to clear to move it."

Then, at page 44, lines 8 to 15:

"Q. Now, on this particular occasion, you say you saw Mr. Young moved up into the air on the elevator? A. Yes.

Q. Had you ever seen that occur before? A. No, sir.

Q. And had you seen Mr. Young move this elevator in the same way before? A. Yes."

Then Mr. Weigart testified at page 135, Vol. II, lines 4 to 24:

"Q. Now, after you got there, do you remember making a telephone call to Mr. Yundt on the telephone, is that right? A. Yes, sir.

Q. Now, would you tell us what the conversation was? What did you say and what did Mr. Yundt say?

Mr. Ives: To which, if your Honor please, I object as to all the defendants I represent except Mr. Yundt himself, on the ground that it is not binding on them.

The Court: The objection is overruled. It will not be binding on any of the defendants if they are not coupled up with Mr. Yundt.

The Witness: Should I answer the question, sir?

The Court: Yes.

A. I called Mr. Yundt and told him that the machine had collapsed and killed one of my employees and that I would like for him to come to the scene of the accident, to see the machine. As I recall, he stated that he knew what happened and there wasn't any need coming out."

Mr. Yundt testified at page 82, Vol. II, line 10, to page 83, line 2:

"Q. You do remember that Mr. Weigart did call? A. I do remember he called me, but what day it was I don't know.

Q. And he told you that there had been an accident? A. That is right.

Q. And you do not remember what was said in the conversation? A. I do not remember.

Q. You don't remember what you said? A. I believe I told him I could not get out on that particular morning to the place where the conveyor was resting at that time, and I did not go out due to the fact I was no longer employed by Aeroil Products Company. The sale was made through that company.

Q. Now, you were selling that machine were you not, at that time? A. That is correct, yes, sir. I advised the manufacturer that date of the accident."

It should be noticed Mr. Yundt did not deny that he stated to Mr. Weigart "that he knew what happened and there wasn't any need coming out." Therefore, this would indicate that defendants knew of the inherent defect in the machine. The knowledge of the defect by the defendants was within them and after such evidence as this it surely is probative that nowhere did the defendants testify they did not know of the defect and the danger of the collapse of the undercarriage of the machine.

Mr. Thomas testified at page 52, Tr. Vol. II, lines 14 to 20:

"Q. Did you notice anything in relation to how that the machine needed to be moved in order to lower it and clear the bank? A. Well, there would be one of the two methods. Like Mr. Young done it, or run diagonally across the street with it so it could be clear across the street and block the street, to be lowered completely down."

Then, at page 53, Tr. Vol. II, line 16, to page 54, line 6:

"Q. (Mr. Thomas): Did you operate that machine yourself there? A. Yes.

Q. In operating that machine did you rely on the statements that you read in this advertising material that you have looked at, as to how to operate the machine? A. Yes.

Mr. Ives: I object to that on the grounds it is immaterial.

The Court: Overruled.

The Reporter: You said 'Yes'?

The Witness: Yes.

Q. By Mr. Rickett: There were no other instructions that you had with relation to the operation of that machine, except those that were contained in those brochures, isn't that right. A. Yes, that is all we had and all we relied on."

Respectfully submitted,

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